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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 802

FRANK BUTCHER, ET AL.,
Petitioners,

vs.

FLORIDA INDUSTRIAL COMMISSION AND
NATIONAL AIRLINES, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, OF FLORIDA, THIRD DISTRICT

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STATEMENT OF THE CASE

Petitioners' attempt to force this case into the mold of *Nash v. Florida Industrial Commission*, 389 U.S. 235, has caused several distortions. It is abundantly clear in the decisions below that the Petitioners were denied un-

employment compensation, not because of their exercise of federally guaranteed rights, but because of their voluntary continued participation in a classic labor dispute.

Petitioners in the first instance left work to engage in a wildcat strike which violated their collective bargaining agreement and the Railway Labor Act. They persisted in their illegal strike despite orders of their employer, their union, and two injunctions of a Federal District Court. (5a)[1] The Appeals Referee of the Florida Industrial Commission noted that: (6a)

> "It is the intent and desire of claimants to resume work for the employer if and when the dispute in which they are now engaged is settled (on the terms that are satisfactory to them). Although each received notice of termination, the employer has never ceased his efforts to prevail upon them to return to their jobs. The employer has been able to recruit some workers to fill positions vacated by claimants; however, none of these newly hired employees have received any assurance from the employer that their services will be utilized on a permanent basis. Since January 17, employment has been, and is now, available for claimants who wish to return to work for the employer. Claimants who did not comply with the employer demand that they report for duty, and who were allegedly terminated, have not been required to forfeit their major rights and privileges as employees of the employer. In that regard, the employer has publicly announced that if they returned they would be reemployed at the previously existing rate of pay and that all pension rights accumulated would be preserved; with respect to other rights (such as extended vacations) they would come in as new employees."

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1. References herein are to page numbers in Petitioners' appendix.

National did not condition its offer of employment on waiver of the right to contest the discharge action; i.e. the employees could *work* at their full rate of pay while prosecuting their grievance and/or judicial remedies, or while pursuing the same remedies they could *walk* a picket line and collect strike benefits. The referee further found: (12a)

> "The testimony will not support a finding that the employer completely severed the employer-employee relationship with claimants upon advising them they had been terminated. If it was the intention of the employer to permanently dispense with their services, he would not have continued his unceasing efforts to have them return, nor would he agree to pay them their previous salary and preserve their pension rights as a further inducement for them to return to his employ. Issuing letters of discharge and termination notices to striking employees is a tactic that is frequently resorted to by a struck employer as a show of strength. It is, however, meaningless unless the employer has permanantly replaced the striking workers and in so doing, removed from them the element of choice or volition as to whether they could have returned to work. Claimants obviously do not consider that they have been discharged as they plan to resume work for the employer when the labor dispute is settled to their satisfaction."

The opinion of the District Court of Appeals reflects consideration and rejection "as without merit" the Petitioners' contention that benefits were denied because they pursued their remedies under the Railway Labor Act. (17a-18a)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. This Court has approved the denial of unemployment compensation when due to a labor dispute. *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143 (1946). The reason ascribed by this Court to the legislative exclusion is "the broad policy of the legislation to compensate only persons involuntarily unemployed." *Ibid.*, fn. 13

2. Petitioners are really urging the Court to reverse the factual finding at all levels below that compensation was denied because of voluntary participation in a labor dispute; i.e. in spite of the classic symptoms of refusal to work at the proffered employment, picketing, and strike benefits the Commission *really* denied the compensation because the Petitioners were pursuing remedies under the Railway Labor Act. The findings of the Referee, the Industrial Commission, and the District Court of Appeal all rest on competent substantial evidence. This Court does not normally exercise its jurisdiction merely to review a decision of a state court upon a question of fact. *Grayson* v. *Harris*, 267 U.S. 352, 358; *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160.

3. The differences between *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, and the instant case are so many as to render *Nash* inappropriate:

(a) *Nash* had been laid off for lack of work and was awaiting only a call to return; Petitioners "elected to remain idle rather than work" (11a) despite repeated solicitations by National.

(b) The sole reason for denying *Nash* compensation was her filing of an unfair labor practice charge.

389 U.S. at 236. The pursuit of federally guaranteed remedies by Petitioners in this case was irrelevant to the denial of compensation.

(c) The dilemma noted by this Court in *Nash* (389 U.S. at 239) (keeping quiet and collecting compensation or filing an unfair labor practice charge and forfeiting compensation) did not exist in this case. The employees had the choice of (1) yielding to their employer's entreaties to return to work at full pay with pension benefits unimpaired, with the unqualified and unconditional right to continue to contest their disciplinary dismissal by grievance or court action, or (2) walk a picket line, withhold their services, and collect benefits from their Union. By what distorted logic can those who elected the latter course claim the right to their employer's financial support (through state unemployment compensation) while they try to destroy its business?

4. Petitioners suggest that withholding of benefits was interference with the free exercise of federal rights, *viz.* picketing, judicial review, and filing of grievances. The short answer is that the benefits would have been denied whether or not the remedies were exercised, so long as the employees continued "withholding their services from the employer in concert and refusing to work at a time when work was available for them [and] . . . further evidenced participation in the dispute by performing picket duty and related services designed to strengthen their position against the employer." (11a) Hence, the Appeals Referee made it very clear that the critical fact leading to denial of benefits was continued participation in the labor dispute. The referee's determination (essentially factual) is amply and adequately supported by the record.

5. This case is further inappropriate for exercise of discretionary jurisdiction because the labor dispute was at least in part a run-of-the-mill economic strike, arising from the union's effort to negotiate increased pay and other benefits. The Union's Vice President described the strike as follows (Tr. 230):

> "I must commend the courage and determination evidenced by our members in this situation and congratulate their *demonstration of absolute unity*. They deserve and are entitled to no less than the unified all-out support, both morally and financially, of our remaining 70,000 Air Transport members. Such an effort will *result in victory and strike a ringing blow for better contracts* not only in this round of negotiations but in all of those which inevitably lie ahead." (Emphasis added)

CONCLUSION

For the reasons stated this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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